

No. 12037

In the United States Court of Appeals for the
Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SAMUEL GOLDWYN, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	3
Statement.....	4
Statement of points to be urged.....	13
Summary of argument.....	14
Argument:	
Preliminary	16
I. The Tax Court erred in failing to hold that the dividend declared in 1930 did not reduce accumulated earnings and profits until it was distributed in the fiscal year 1933.....	18
II. The Tax Court erred in holding, in the alternative, that in any event the earnings and profits were reduced in the fiscal year 1931 because the shareholders during that year constructively received the dividend declared in 1930.....	30
Conclusion.....	37

CITATIONS

Cases:

<i>Aetna Life Ins. Co. v. Kepler</i> , 116 F. 2d 1.....	29
<i>Atlantic Land Co. v. Commissioner</i> , 43 B. T. A. 474.....	33
<i>Avery v. Commissioner</i> , 292 U. S. 210.....	20, 32, 37
<i>Baker v. United States</i> , 17 F. Supp. 976.....	32
<i>Bazley v. Commissioner</i> , 331 U. S. 737.....	24, 28
<i>Bingham, Trust of v. Commissioner</i> , 325 U. S. 365.....	27
<i>Bouligny, R. H., Inc. v. Commissioner</i> , 45 B. T. A. 456.....	33
<i>Caldwell, W. E., Co. v. Commissioner</i> , 6 B. T. A. 47.....	23
<i>Campana Corp. v. Harrison</i> , 114 F. 2d 400.....	29
<i>Commissioner v. American L. & T. Co.</i> , 156 F. 2d 398.....	19
<i>Commissioner v. Batten, Barton, Durstine & Osborn</i> , decided De- cember 23, 1948.....	27
<i>Commissioner v. Estate of Bedford</i> , 325 U. S. 283.....	21
<i>Commissioner v. Munter</i> , 331 U. S. 210.....	21
<i>Commissioner v. National Carbide Corp.</i> , 167 F. 2d 304, certiorari granted, 335 U. S. 810.....	27
<i>Commissioner v. Rainier Brewing Co.</i> , 165 F. 2d 217, rehearing denied, 166 F. 2d 324.....	26
<i>Commissioner v. Revere Land Co.</i> , 169 F. 2d 469, certiorari denied, 335 U. S. 853.....	27
<i>Commissioner v. Scatena</i> , 85 F. 2d 729.....	20, 34

Cases—Continued

	Page
<i>Commissioner v. Wheeler</i> , 324 U. S. 542.....	21, 25
<i>Crane v. Commissioner</i> , 331 U. S. 1.....	27
<i>Curtis v. Commissioner</i> , 89 F. 2d 736.....	32
<i>Davidson v. Commissioner</i> , 305 U. S. 44, affirming 94 F. 2d 300..	32
<i>Dobson v. Commissioner</i> , 320 U. S. 489.....	27
<i>Edwards v. Douglas</i> , 269 U. S. 204.....	24
<i>Faris v. Helvering</i> , 71 F. 2d 510, certiorari denied, 293 U. S. 584..	22
<i>Hadley v. Commissioner</i> , 36 F. 2d 2.....	32
<i>Hartz v. Commissioner</i> , decided October 27, 1948.....	28
<i>Helvering v. Midland Ins. Co.</i> , 300 U. S. 216.....	24
<i>Henninger v. Commissioner</i> , 21 B. T. A. 1235.....	17
<i>James v. Commissioner</i> , 13 B. T. A. 764, affirmed 49 F. 2d 707..	26
<i>Jones v. Dawson</i> , 148 F. 2d 87.....	32
<i>Kohl v. Commissioner</i> , decided November 12, 1948.....	28
<i>Korfund v. Commissioner</i> , 1 T. C. 1180.....	33
<i>Kuhn v. Princess Lida of Thurn & Taxis</i> , 119 F. 2d 704.....	29
<i>Lawrence v. Commissioner</i> , 143 F. 2d 456.....	34
<i>Mason v. Routzahn</i> , 275 U. S. 175.....	19
<i>McWilliams v. Commissioner</i> , 331 U. S. 694.....	27
<i>Phelps v. Commissioner</i> , 54 F. 2d 289, certiorari denied, 285 U. S. 558.....	31
<i>Proctor v. Commissioner</i> , 11 B. T. A. 235.....	19
<i>Putnam's Estate v. Commissioner</i> , 324 U. S. 393.....	20
<i>Ross v. Commissioner</i> , 169 F. 2d 483.....	21, 27
<i>Saenger, A. D., Inc. v. Commissioner</i> , 84 F. 2d 23, certiorari denied, 299 U. S. 577.....	32
<i>Sanborn v. Commissioner</i> , 88 F. 2d 134, certiorari denied, 301 U. S. 700.....	31
<i>Sanford Corp. v. Commissioner</i> , 106 F. 2d 882.....	20
<i>Schweppé v. Commissioner</i> , 168 F. 2d 284.....	26
<i>Seattle Brewing Co. v. Commissioner</i> , 165 F. 2d 216, rehearing denied, 166 F. 2d 326.....	26
<i>Smith, Frederick, Enter. Co. v. Commissioner</i> , 167 F. 2d 357.....	20, 33
<i>Strauss v. Commissioner</i> , 168 F. 2d 441.....	27
<i>Tar Products Corp. v. Commissioner</i> , 130 F. 2d 866.....	19
<i>Tate v. Commissioner</i> , 97 F. 2d 658, certiorari denied, 305 U. S. 639.....	31
<i>United States v. Anderson</i> , 108 F. 2d 475.....	29
<i>United States v. Armature Rewinding Co.</i> , 124 F. 2d 589.....	29
<i>United States v. Moroloy Bearing Service</i> , 124 F. 2d 373.....	29-30
<i>United States v. Phellis</i> , 257 U. S. 156.....	31
<i>United States v. Phillips</i> , 24 F. 2d 195.....	19
<i>Valley Lumber Co. v. Commissioner</i> , 43 B. T. A. 423.....	33
<i>Valley Tractor & Equipment Co. v. Commissioner</i> , 42 B. T. A. 311.....	33
<i>West Construction Co. v. Commissioner</i> , 7 T. C. 974.....	24

Statutes:

Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Sec. 36.....	28
---	----

III

Statutes—Continued

Internal Revenue Code:	Page
Sec. 115 (26 U. S. C. 1946 ed., Sec. 115)-----	3
Sec. 718 (26 U. S. C. 1946 ed., Sec. 718)-----	23
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 115-----	3
Second Revenue Act of 1940, c. 757, 54 Stat. 974, Sec. 201-----	23

Miscellaneous:

Report of Subcommittee of the Committee on Ways and Means, on Proposed Excess-Profits Taxation, 67th Cong., 3d Sess. (dated August 8, 1940) pp. 3, 5-----	24
Rules of Civil Procedure, Rule 52-----	29
Treasury Regulations 74, Art. 333-----	32
Treasury Regulations 111, Sec. 29.42-3-----	32
Treasury Regulations 112, Sec. 35.718-5-----	23

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OPINION BELOW

The findings of fact (R. 23-28) and the majority (R. 28-36) and dissenting (R. 36-46) opinions of the Tax Court are reported at 9 T. C. 510.

JURISDICTION

This petition for review (R. 205-209) involves a proceeding with respect to a deficiency in income tax for the year 1943 determined by the Commissioner against Samuel Goldwyn, the respondent on review (hereinafter referred to as "the taxpayer"), in the amount of \$117,688.82 (R. 8-14). The taxpayer is an individual residing in Beverly Hills, California, and filed his income tax returns for the years 1942 and 1943 with the Collector of Internal Revenue for

the Sixth District of California. (R. 23.) By letter dated June 29, 1945 (R. 8-14), the Commissioner of Internal Revenue notified the taxpayer that the determination of his income tax liability for the year 1943 disclosed a deficiency in the amount of \$117,688.82. Within ninety days thereafter, namely, on July 19, 1945 (R. 1), the taxpayer filed with the Tax Court a petition (R. 4-8) for a redetermination of the deficiency determined by the Commissioner as above stated, pursuant to Section 272 of the Internal Revenue Code. On November 17, 1947, the Tax Court entered its decision (R. 48), finding no deficiency for the year 1943. Less than three months thereafter, namely, on February 4, 1948, the Commissioner filed his petition (R. 205-209) for a review by this Court of the decision of the Tax Court, pursuant to the then applicable provisions of Sections 1141 and 1142 of the Internal Revenue Code, which have since been amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

The question in this case is as to what portion of a dividend received by the taxpayer in 1942 is taxable to him as a distribution of earnings and profits. That question turns upon whether a prior dividend, declared and payable in 1930, reduced earnings and profits of the corporation in that year (fiscal year ended June 30, 1931), or whether that dividend was not "distributed" and the earnings and profits were not reduced until the fiscal year ended in 1933, when it was actually paid.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend*.—The term “dividend” when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions*.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. * * *

(26 U. S. C. 1946 ed., Sec. 115.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend*.—The term “dividend” when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions*.—For the purposes of this Act every distribution is made

out of earnings or profits to the extent thereof,
and from the most recently accumulated earnings or profits. * * *

* * * * *

STATEMENT

The facts in this case were developed by a stipulation between the parties (R. 142-145), certain oral testimony (R. 65-126), and certain exhibits (R. 145-204) adduced in evidence before the Tax Court, as well as by some statements or stipulations of record by counsel for the parties at the trial (R. 128-141), from which the Tax Court in the course of the majority opinion (R. 22-36) made separate findings of fact (R. 23-28) which may be stated as follows:

The taxpayer for many years has been actively engaged in the motion picture industry, and on December 14, 1942, he became the owner of all of the capital stock of Samuel Goldwyn Studios, a California corporation, which was formerly known as United Artists Studio Corporation (the term "Studios" will be used hereinafter to refer to this corporation). (R. 23, 24.)

On November 30, 1942, by resolutions¹ of its board of directors, Studios had reduced the par value of its capital stock and had voted a distribution of \$800,000 to its shareholders out of surplus, which then amounted to \$870,390. Pursuant thereto, Studios distributed \$800,000 to the taxpayer on December 31, 1942 (R. 23-24) (and it may be pointed out at this point, the controversy in this case is as to what por-

¹ Copies of these resolutions are set out in Joint Exhibit 1-A (R. 145-148).

tion of that \$800,000 is taxable to the taxpayer as a dividend).

Studios had been organized in 1926 by Joseph M. Schenck, Mary Pickford and Douglas Fairbanks, and had acquired certain land in Hollywood, California, on which it erected buildings and other facilities for the production of motion pictures on a large scale, and it engaged in the rental of those facilities to producers of pictures, principally its own stockholders. In 1930 Studios was controlled by Feature Productions, Inc., which owned 66 percent of its outstanding shares and had agreed to purchase 23 percent more. All of Studios' stockholders were represented on its board of directors and took an active part in its affairs. They were billed weekly for the use of the facilities and for services and materials furnished, and made payment when Studios needed funds. A running account for each shareholder was maintained on the books, reflecting debit and credit entries. Studios and Feature Productions had the same manager, and the officers and directors of both were comprised largely of the same individuals. (R. 24.)

Studios maintained its accounts and filed its income tax returns on the accrual basis for a fiscal year ended June 30. At the end of its fiscal year ended June 30, 1930, Studios had accumulated earnings and profits (accumulated since February 28, 1913) in the amount of \$286,399.42, of which \$181,521.28 were earnings and profits for the fiscal year 1930. On September 11, 1930, its board of directors declared a "cash dividend" of \$21 per share to its shareholders of record as of September 10, 1930, payable on December 15, 1930,

the resolution² further authorizing and directing the treasurer of the corporation to give notice of and to pay the dividend when due. (R. 24-25.)

Pursuant to that resolution, an entry of the same date was made in the corporation's journal,³ debiting surplus with \$203,091,⁴ and crediting each of the twelve shareholders with his proportionate share of the amount declared as a dividend. The shareholders' portions of the amount of the dividend declared were likewise credited in the ledger to an account styled "Dividends Payable".⁵ The amounts so entered in the journal and in the "Dividends Payable" account of the ledger, however, were not credited in the shareholders' individual running accounts with the corporation, and hence the balances in the latter accounts did not reflect the dividend credits. (R. 25.)

² A copy of the minutes of the meeting of the board of directors at which the resolution was adopted (R. 143-144) is set forth in Joint Exhibit 2-B (R. 149-151).

³ The details of this entry appear in Exhibit 3-C (R. 152). While the Tax Court refers to the entry as being "of even date" (R. 25) with the resolution of September 11, 1930, the parties had stipulated (R. 144) that the entry was made on September 17, 1930, which is also the date of the corresponding credit entries in the "Dividends Payable" account (R. 156). In the reproduction of Exhibit 3-C in the printed record, the date of this journal entry appears erroneously as September 7, 1930. (R. 152.)

⁴ This is the correct amount of the total dividend declared. The original entry in the journal (Ex. 3-C, R. 152) was of an amount (\$204,656.67) which was greater by \$1,565.67 erroneously credited to Samuel Goldwyn, Inc., Ltd., but the error was later corrected by a reversing entry which eliminated the excess (R. 25; 91; also Joint Ex. 6-F, R. 156).

⁵ This "Dividends Payable" account is reproduced in Joint Exhibit 6-F. (R. 156-157.)

Of the twelve shareholders, seven nominally held one qualifying share each on account of others, and one was a corporation of Mary Pickford and Douglas Fairbanks. On September 17 and December 15, 1930, the net indebtedness of the shareholders to Studios was \$85,865.06 and \$90,818.87, respectively, distributed as follows ⁶ (R. 25-26):

	<i>Sept. 17, 1930</i>	<i>Dec. 15, 1930</i>
Feature Productions Inc., debit-----	\$4,133.41	\$83,986.05
Douglas Fairbanks, credit-----	5,143.19	2,459.27
Mary Pickford Fairbanks, debit-----	21,913.27	1,324.69
Samuel Goldwyn, Inc., debit-----	64,961.57	3,948.86

The amounts of the indebtedness of the shareholders to Studios varied greatly from time to time. Up to June, 1933, the maximum indebtedness of Feature Productions was \$240,783.44 on February 18, 1933; of Mary Pickford, \$40,471 on December 31, 1932; of Samuel Goldwyn, Inc., \$116,299.98 on January 14, 1933; of Douglas Fairbanks, \$22,644.12 on July 23, 1932.⁷ (R. 26.)

⁶ These, Feature Productions, Inc., Samuel Goldwyn, Inc., Mary Pickford and Douglas Fairbanks, were in substance all of the stockholders of Studios, since the other stockholders held their respective qualifying shares for these stockholders.

⁷ The range in the amounts owed to Studios by Feature Productions, Samuel Goldwyn, Mary Pickford and Douglas Fairbanks, respectively, is illustrated by Respondent's Exhibits E, F, G and H. (R. 193-196.) These tabulations showing the amounts owed to Studios by the shareholders on various dates, respectively, were prepared by the taxpayer's witness, Mr. Ezzell, auditor and later general manager of Studios (R. 65-66), who, by agreement of counsel, submitted in that form the information which counsel for the Commissioner had sought to elicit on cross-examination (R. 106-113, 128-134). Also illustrative of the amounts owed Studios by the shareholders, respectively, are Respondent's Exhibits I, J, K and L (R. 197-204), which are reproductions of

On Studios' income tax return for the fiscal year 1931,⁸ the dividend was reported as declared on September 10, 1930, but unpaid at the end of the year, and the amount was shown under "Other Liabilities" as "Dividends Payable".⁹ During the fiscal years ended June 30, 1931, 1932, and 1933, Studios sustained statutory net losses of \$97,650.97, \$28,475.54, and \$101,349.36, respectively.¹⁰ (R. 26.)

Cash payment of the dividend declared in 1930 was not made, but on June 27, 1933, Feature Productions instructed Studios by letter¹¹ to apply to its indebtedness to Studios \$136,327.17, to which the dividend declaration entitled it, and \$28,000 of the dividend due to Mary Pickford and Douglas Fairbanks,¹² who had assigned this part to it (Feature). On the same

certain ledger sheets containing entries in the respective accounts of the shareholders during certain months of 1933 (R. iv, 128-134).

⁸ This is Respondent's Exhibit B. (R. 169-177.)

⁹ The aggregate amount of the unpaid dividend shown as a liability at the end of the year on the return for the fiscal year 1931 was \$204,656.67 (R. 173), which is the erroneous amount originally entered on the books (see journal entry of September 17, 1930, at R. 152)—before the correction heretofore mentioned. The return for the fiscal year ended 1932 (Resp. Ex. C, R. 178-185) shows the corrected figure of \$203,091 (R. 181) as the amount of the liability for the unpaid dividend at the end of that year, and, likewise, the return for the fiscal year ended 1933 (Resp. Ex. D, R. 186-193) shows the corrected amount of \$203,091 (R. 189) as the amount of the liability for the unpaid dividend at the beginning of that year.

¹⁰ See Respondent's Exhibits B, C and D at R. 169, 178, 186.

¹¹ This letter is Petitioner's Exhibit 2. (R. 159.)

¹² The letter as to this \$28,000 is Petitioner's Exhibit 1. (R. 158.)

date, shareholders Samuel Goldwyn, Inc., and Abraham Lehr similarly directed that \$20,979 and \$21 of the dividend due them, respectively, likewise be applied on debts to Studios.¹³ (R. 26.)

By journal entries dated May 27, 1933, the “dividends payable” account was debited with \$203,901 and credits were entered as follows (R. 27):

Accounts Receivable:

Feature Prod., Inc., Ltd_____	\$164,327.17
Samuel Goldwyn, Inc., Ltd_____	21,000.00
Mary Pickford Fairbanks_____	6,649.87
Douglas Fairbanks_____	5,695.03

Accounts Payable:

Mary Pickford Fairbanks_____	2,232.05
Douglas Fairbanks_____	3,186.88

203,091.00

Explanation: To charge Accounts Receivable from stockholders against adjusted Dividends Payable to them and to credit any excess of dividends over such receivables to Accounts Payable. This entry per instructions of A. M. Brentinger. [manager]¹⁴

¹³ These letters are, respectively, Petitioner’s Exhibits 3 (R. 160) and 4 (R. 161). By his letter, Lehr authorized that the \$21 dividend payable to him be applied to the indebtedness of Samuel Goldwyn, Inc., to Studios. The record reveals no similar authorizations by the other individual holders of one share of stock, to each of whom the sum of \$21 was payable as a dividend (R. 152), although by checking the amounts of the credits finally made in 1933 (see R. 154) it will readily appear that four of such dividends were included in the credit to Feature Productions and two \$21 dividends were included in the credits to Mary Pickford and Douglas Fairbanks—the credit to the latter two also included the amount of the dividend (\$3,763.83) payable to their corporation, Pickford Fairbanks Studios (see R. 152).

¹⁴ Joint Exhibit 5-E (R. 154) on which this journal entry of May 27, 1933, is reproduced contains the following additional notation at the end thereof:

“See letters from Abraham Lehr, Samuel Goldwyn, Inc., Ltd., and Feature Prod. Inc., Ltd., dated 6/27/33 authorizing above—in dividend file.”

An appropriate journal entry¹⁵ likewise recorded the assignment to Feature Productions¹⁶ of \$28,000 of dividends due Mary Pickford and Douglas Fairbanks “leaving amount due last two named \$17,763.83.” (R. 27.) Only entries relating to this transfer were entered in the ledger account “Dividends Payable.”¹⁷ A credit balance of \$203,091 appears in the account prior to the fiscal year 1933, while there is no balance as of the end of that year. Under date of May 27, 1933, Studios sent a notice to Feature Productions that its account had been credited with \$164,327.17 “amount of dividend due you” and sent a like notice of a credit of \$21,000 to Samuel Goldwyn, Inc.¹⁸ (R. 27.)

On its income tax return for the fiscal year 1933 Studios reported as a liability at the beginning of the year dividends payable of \$203,091; at the end of the year, none. (R. 27–28.)¹⁹

¹⁵ This is reproduced in Joint Exhibit 4–D. (R. 153.)

¹⁶ The Tax Court at this point (R. 27) speaks of the entry as recording the assignment to “Samuel Goldwyn, Inc.”, which is obviously an error: The assignment was to Feature Productions, as clearly appears in Joint Exhibit 4–D (R. 153) and in Petitioner’s Exhibit 1 (R. 158); see also R. 137, 138–139.

¹⁷ This statement by the Tax Court appears to be in error: Joint Exhibit 6–F shows that a debit entry of \$203,091 was also made in the “Dividends Payable” account immediately following the May 27, 1933, entry relative to the assignment of the \$28,000 from Mary Pickford and Douglas Fairbanks to Feature Productions (R. 156)—indeed, this is reflected in the next sentence in the Tax Court’s findings to the effect that as of the end of the fiscal year 1933 the account no longer showed the previously existing credit balance of \$203,091.

¹⁸ Copies of these notices appear in Joint Exhibit 5–E. (R. 155.)

¹⁹ This appears at R. 189, in one of the schedules accompanying the return for that year, Respondent’s Exhibit D. (R. 186–193.)

Mary Pickford and Douglas Fairbanks reported receipt of their portions of the dividend in question (declared by Studios in 1930) in their income tax returns for 1933, attaching notes explanatory of the assignment of the \$28,000 to Feature Productions. In its consolidated return for 1931 Art Cinema Corporation, of which Feature Productions was a subsidiary, reported receipt of the dividend of \$136,327.17. (R. 28.)²⁰

In his income tax return for 1942 the taxpayer reported the dividend of \$800,000 paid to him by Studios as a return of capital—and hence did not include any part of it in his taxable gross income. The Commissioner determined that the sum of \$239,059.58 of that dividend constituted taxable income and accordingly increased the taxpayer's income by that amount and arrived at the deficiency of \$117,688.82 involved in this case. (R. 8-14, 28.)²¹

²⁰ As brought out in the record, however, Art Cinema took an offsetting deduction in its consolidated return in the same amount on account of the dividend reported received from Studios. (R. 140-141.)

²¹ In his determination, in addition to adding to the taxpayer's income for 1942 the portion of the dividend just referred to, the Commissioner also made another adjustment to the taxpayer's income whereby he added some \$1,000,000 to the capital gain reported by the taxpayer. (R. 10.) The other adjustment had been previously agreed to by the taxpayer (R. 10), and the additional income tax attributable thereto, as well as the additional income tax attributable to the portion of the 1942 dividend which the taxpayer concedes to be taxable income, had been covered by additional assessments made subsequent to the filing of the returns (R. 14), so that the deficiency finally determined by the Commissioner in the amount of \$117,688.82 relates entirely to the adjustment on account of the 1942 dividend in controversy in this case

Before the Tax Court, the parties by stipulation (R. 142-145) agreed that of the total dividend of \$800,000 received by the taxpayer in 1942, the sum of \$239,059.58 constituted a distribution of accumulated earnings and profits (and hence was taxable as income to the taxpayer, as determined by the Commissioner) if the \$203,091 dividend declared in 1930 reduced the earnings and profits of Studios in the fiscal year ended June 30, 1933, as determined by the Commissioner; but if the dividend declared in 1930 reduced earnings and profits in the fiscal year ended June 30, 1931, then only \$104,610.56 of the \$800,000 dividend of 1942 constituted a distribution of earnings and profits (R. 28).

Upon the basis of the foregoing findings, the Tax Court concluded that distribution of the dividend declared in 1930 was made in the fiscal year ended June 30, 1931, and the Studios' accumulated earnings and profits were reduced by the amount of it in that year—and, pursuant to the stipulation of the parties, the Tax Court accordingly decided that only \$104,610.56 of the \$800,000 dividend received by the taxpayer in 1942 constituted a distribution of earnings

(see R. 8-14)—hence, the statement made at the outset of the majority opinion of the Tax Court (R. 22-23), to the effect that the deficiency results only “in part” from the dividend adjustment in question, appears to be in error.

For the sake of clarity, it may be pointed out in passing that while the disputed item is an adjustment to 1942 income, the deficiency which was determined was for the year 1943, as the result of giving effect to the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, whereby the 1942 tax, being larger than the tax for 1943, becomes the 1943 tax: See the statement accompanying the deficiency notice. (R. 9-14.)

and profits. (R. 28, 36.)²² Upon the basis of these conclusions reached in the majority opinion of the Tax Court (five members of the Tax Court dissented (R. 36-46), as will be hereinafter brought out more fully), the Tax Court entered a decision against the Commissioner, finding no deficiency in tax for the year 1943 (R. 48).²³ The present review followed.

STATEMENT OF POINTS TO BE URGED

In the present review, the Commissioner urges and relies upon all of the points originally stated and set out by him (R. 207-209) in his petition for review and subsequently adopted by him in this Court (R. 219) as the points upon which he intends to rely. For present purposes, the points relied upon and urged by the Commissioner may be stated briefly as follows: (1) The Tax Court erred in holding and deciding that the earnings and profits of Studios were reduced in the fiscal year ended 1931 by the dividend declared in 1930 upon the declaration thereof and the book entries which were made in 1930, even though the declared dividend was not paid or distributed until the fiscal year 1933 when the respective shareholders' accounts were credited with their proportionate part of the dividend; (2) the Tax Court erred in holding and deciding, in the alternative, that in any event the earnings and profits of Studios were

²² While these statements appear in that portion of the Tax Court's majority opinion headed "FINDINGS OF FACT", they cannot, as will be hereinafter brought out, be regarded as findings.

²³ No deficiency, since, as already indicated in fn. 21, the tax attributable to the portion of the 1942 dividend which the taxpayer agreed was taxable, had already been assessed.

reduced in the fiscal year 1931 because the shareholders constructively received the dividend declared in 1930 in the fiscal year 1931; and (3) the Tax Court erred in holding and deciding that only \$104,610.56 of the \$800,000 dividend received by the taxpayer in 1942, constituted a distribution of earnings and profits and hence was subject to tax.

SUMMARY OF ARGUMENT

1. It is submitted that the majority of the Tax Court was clearly in error in failing to hold that the accumulated earnings and profits of Studios were not reduced by the dividend declared in 1930 until the fiscal year 1933, when the dividend was distributed by the credits then made against the respective indebtedness of the shareholders to Studios. The statute defines a dividend as a *distribution out of* accumulated earnings and profits. The plain terms of the statute clearly require the result contended for by the Commissioner, namely, that the accumulated earnings and profits of a corporation are not reduced until the distribution of a dividend by payment, actual or constructive. Hence, since in this case the dividend declared in 1930 was not distributed or paid to the shareholders until the fiscal year 1933, when it was credited against the indebtedness of the shareholders, the accumulated earnings and profits of Studios should not be held to have been reduced until that distribution was made during the fiscal year 1933. The holding of the majority of the Tax Court that the accumulated earnings and profits of Studios were reduced during the fiscal year 1931 by the dividend

declared in 1930 is clearly erroneous, as a matter of law, and therefore should be reversed.

The question presented to this Court on this point is a pure question of law, clearly reviewable. The question is exclusively one as to the proper meaning or interpretation of a provision of the statute, and this Court unquestionably has the power to review the decision of the Tax Court with respect thereto.

2. The majority of the Tax Court also erred in holding, in the alternative, that even if accumulated earnings and profits are not reduced until the distribution of a dividend, then in any event the accumulated earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930 because the shareholders constructively received that dividend during the fiscal year 1931. It is true that under the rule of "constructive receipt" a dividend credited to a shareholder and unqualifiedly subject to his command, is taxable to him in the year of credit, whether or not withdrawn. In this case, however, the important elements essential as a matter of law to establish "constructive receipt" are absent: There was no segregation, and the dividend was not credited to the shareholders in the fiscal year 1931 in any manner which placed the funds under their unqualified dominion or control. Clearly, as a matter of law, there was no "constructive receipt" of the dividend by the shareholders during the fiscal year 1931 upon the facts of this case, and the holding to the contrary by the majority of the Tax Court should therefore be reversed.

This second or alternative question, just as the first question, is a pure question of law which this Court clearly has the power to review.

ARGUMENT

Preliminary

As heretofore brought out, the parties before the Tax Court had agreed that of the total dividend of \$800,000 received by the taxpayer in 1942, the amount of \$239,059.58 constituted a distribution of earnings and profits and hence was taxable to the taxpayer if the dividend declared in 1930 reduced earnings and profits of Studios in the fiscal year 1933; but if the dividend declared in 1930 reduced earnings and profits in the fiscal year 1931, then only \$104,610.56 of the \$800,000 1942 dividend constituted a distribution of earnings and profits and was taxable to the taxpayer. Thus, while in his return the taxpayer had treated the entire \$800,000 1942 dividend as nontaxable, he conceded before the Tax Court that at least \$104,610.56 thereof was taxable—while the Commissioner, on the other hand, had determined and contended before the Tax Court that \$239,059.58 of the 1942 dividend was taxable.

Hence, the controversy related only to the difference between those two figures, i. e., \$134,449.02. Under the Commissioner's view, the dividend declared in 1930 did not reduce earnings and profits until 1933 when it was paid: Hence, the June 30, 1930, accumulated earnings and profits of Studios amounting to \$286,399.32 are treated as being reduced by the losses subsequently sustained by Studios, with the result

that when the dividend declared in 1930 was paid in 1933, the then remaining accumulated earnings and profits could absorb only a portion (\$68,641.98) of it, and the balance (\$134,449.02)²⁴ of the dividend must be treated as paid from other than earnings and profits and accordingly is not charged against earnings and profits.²⁵ On the other hand, under the taxpayer's view, since the dividend declared in 1930 is treated as paid in the fiscal year 1931, the entire amount of that dividend is charged against earnings and profits in that year, with the result that under his computation the earnings and profits available for distribution in 1942 are \$134,449.02 less than under the Commissioner's computation.

In deciding the case against the Commissioner, the majority of the Tax Court held that the declaration of the dividend in 1930, coupled with the debit to sur-

²⁴ The Commissioner's computation whereby he arrived at the amount of \$239,059.58 which he determined was the extent to which the 1942 dividend constituted a distribution of accumulated earnings and profits is not contained in the record but, since the parties agreed as to the *amounts* in which under their respective theories the 1942 dividend constituted a distribution of earnings and profits, its absence is not material. The difference between those two amounts (\$239,059.58 and \$104,610.56), namely, \$134,449.02, represents the portion of the dividend declared in 1930 which under the Commissioner's view was not chargeable against earnings and profits when paid in 1933, and the difference between this last amount and the amount of the dividend declared in 1930 (\$203,091), namely, \$68,641.98, represents the portion of the dividend declared in 1930 chargeable against earnings and profits when paid in 1933.

²⁵ That the portion of the dividend which exceeded the then remaining accumulated earnings and profits was not chargeable against earnings and profits is clear. See *Henninger v. Commissioner*, 21 B. T. A. 1235.

plus and the credit to the "Dividends Payable" account, was sufficient to reduce accumulated earnings and profits in the fiscal year 1931, even though the distribution of the dividend to the shareholders be regarded as not having been made until the fiscal year 1933 when the amount thereof was credited against the indebtedness of the shareholders to Studios. In addition, the majority of the Tax Court further held, in the alternative, that even if the correct rule be that earnings and profits are not reduced until the distribution of a dividend, then in any event the earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930 because the shareholders constructively received the dividend in the fiscal year 1931. (R. 28-36.)

Five members of the Tax Court dissented, Judge Disney writing a dissenting opinion, dissenting on both of the grounds relied upon by the majority, and three other members agreed with Judge Disney's dissenting opinion. (R. 36-46.)

The two grounds relied upon by the majority of the Tax Court will be discussed separately.

I

The Tax Court erred in failing to hold that the dividend declared in 1930 did not reduce accumulated earnings and profits until it was distributed in the fiscal year 1933

It is submitted that the majority of the Tax Court erroneously held, on this phase of the case, that the accumulated earnings and profits of Studios were reduced in the fiscal year 1931 by the dividend declared in 1930, instead of holding that the earnings and

profits were not reduced until the fiscal year 1933 when that dividend was distributed by the credits against the indebtedness of the shareholders to Studios.

The statute, Section 115 (a) of the Internal Revenue Code, *supra*, defines a dividend as a "distribution" by a corporation to its shareholders "out of" accumulated earnings and profits—and the term "dividends" was, insofar as here material, similarly defined in Section 115 (a) of the Revenue Act of 1928, *supra*, which was in force in 1930. As correctly pointed out in the dissenting opinion (R. 39-40), the term "distribution" means "division or apportionment among several or many," and therefore the dividend declared in 1930 cannot properly be regarded as having been "distributed," by the declaration or by the bookkeeping entries in 1930, *out of* the earnings and profits of Studios, within the plain terms of the statute. In other words, the plain terms of the statute, we submit, clearly require the result contended for by the Commissioner, namely, that the earnings and profits of a corporation are not reduced until the distribution of a dividend by actual or constructive payment. This view is in keeping with and fully supported by the settled rule that it is the distribution or payment of a dividend, and not the declaration, which governs for tax purposes. *Mason v. Routzahn*, 275 U. S. 175; *United States v. Phillips*, 24 F. 2d 195 (C. C. A. 3d); *Proctor v. Commissioner*, 11 B. T. A. 235; *Commissioner v. American L. & T. Co.*, 156 F. 2d 398 (C. C. A. 7th); *Tar Products Corp. v. Commissioner*, 130 F. 2d

866 (C. C. A. 3d); *Sanford Corp. v. Commissioner*, 106 F. 2d 882 (C. C. A. 3d). See also *Commissioner v. Scatena*, 85 F. 2d 729 (C. C. A. 9th); *Frederick Smith Enter. Co. v. Commissioner*, 167 F. 2d 357 (C. C. A. 9th); *Avery v. Commissioner*, 292 U. S. 210; *Putnam's Estate v. Commissioner*, 324 U. S. 393. The majority of the Tax Court recognized the rule just referred to (R. 31-32) but in arriving at its conclusion stated that the rule, applicable in determining the time when a dividend is taxable to the shareholder, is of no application in determining the time when earnings and profits of the corporation are reduced. The majority further stated that the dividend declaration gave rise to a debtor-creditor relationship between the corporation and the shareholders, and that, the amount of the dividend having been charged to surplus at that time, the earnings and profits of the corporation were reduced in the fiscal year 1931 by the declared dividend. (R. 32-33.)

In holding the above mentioned rule to be inapplicable in this case, the majority of the Tax Court makes the comment (R. 32) that the rule "is one of convenience rather than of strict law", citing *Commissioner v. American L. & T. Co.*, *supra*. It is true that the opinion in that case (p. 400) contains a statement which recognizes that one of the reasons for the rule is the administrative convenience in checking returns, but the opinion further recognizes that earnings and profits available for the payment of a dividend are to be determined as of the time of the payment of the dividend rather than the time of its declaration. There is nothing in the opinion in that

case, we believe, justifying the view that the rule is not one of law.²⁶

Entirely aside from this, it is submitted that the view of the majority, to the effect that there should be one rule for determining when the stockholders are taxable on a dividend and another rule for determining when earnings and profits are reduced, is unsound and illogical. The tax consequences of a dividend, including the time when it is taken into consideration for tax purposes, should be the same both as to the corporation and as to the stockholder, we submit. This is in keeping with other provisions of our income tax law. For example, under our income tax law, the earnings and profits of a corporation are not considered as distributed or reduced by a distribution upon which no gain to the distributee is recognized by law, or by a stock dividend which is non-taxable to the distributee. See Section 115 (h) of the Internal Revenue Code. *Commissioner v. Estate of Bedford*, 325 U. S. 283; cf. *Commissioner v. Wheeler*, 324 U. S. 542, and *Commissioner v. Munter*, 331 U. S. 210. Since for income tax purposes the treatment to the distributee controls in determining *whether* a distribution reduces earnings and profits of a corporation, it should likewise control in determining *when* the distribution reduces corporate earnings and profits. Hence in this case, since the date of payment or distribution, and not of declaration, deter-

²⁶ Cf. *Ross v. Commissioner*, 169 F. 2d 483, 493 (C. C. A. 1st), in which the court (in an opinion by Mr. Justice Frankfurter, sitting as Circuit Justice) holds that the rule of "constructive receipt" is one of law.

mines the taxability of a dividend to the shareholders, the date of payment or distribution likewise should determine the time when the earnings and profits of the corporation are reduced.

Therefore, since in the instant case the dividend declared in 1930 was not distributed or paid to the shareholders until the fiscal year 1933, when the amount thereof was credited against the indebtedness of the shareholders to Studios, the earnings and profits of Studios should not be held to have been reduced until that distribution of the dividend in the fiscal year 1933.

The fact that upon the mere declaration of a dividend a debtor-creditor relationship is generally recognized as coming into existence for many purposes as between the corporation and the shareholder, and the fact that the law of California (applicable here) conforms to that general rule, as pointed out in the majority opinion of the Tax Court (R. 30-31), should not be controlling in resolving the federal tax question involved here. See *Faris v. Helvering*, 71 F. 2d 610, 611 (C. C. A. 9th, certiorari denied, 293 U. S. 584. The question here is as to whether there has been a "distribution * * * out of" earnings and profits of a corporation within the terms of Section 115 (a), and the answer to that question should not be controlled by considerations as to whether for some other purposes, as between the corporation and the shareholder, a debtor-creditor relationship has come into existence upon the declaration of a dividend. In this connection, it may be pointed out that no controlling significance should be attached to the fact that, as

mentioned in the majority opinion (R. 30), the debtor-creditor concept was relied upon in some of the earlier cases involving the first excess profits tax law, in determining the effect of a declared dividend upon invested capital, such as *W. E. Caldwell Co. v. Commissioner*, 6 B. T. A. 47. An excess profits tax was also in force during the last war, under the new subchapter (SUBCHAPTER E. EXCESS PROFITS TAX) which was added to the Internal Revenue Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, entitled "Excess Profits Tax Act of 1940". In the Regulations promulgated thereunder, in prescribing the rules by which the daily equity invested capital is to be reduced by distributions, it is stated that a "distribution is considered to be made on the date that it is payable" and when no date for payment is set the "distribution is considered to be made on the date when it is declared". Treasury Regulations 112, Section 35.718-5. But, we submit, the provision of that regulation should have no significance in determining the question involved in this case. The determination of invested capital under Section 718 of the Code, for excess profits tax purposes, and the provisions of the Regulations for the reduction thereof by reason of corporate distributions, turn upon entirely different considerations, we submit, and therefore should be accorded no controlling effect upon the question involved in this case. Section 718 is a provision granting a credit from the excess profits tax based upon the amount of capital invested in the business venture, with certain specific additions and adjustments—in other words, it is a

provision written into the law to “establish a measure by which the amount of profits which were ‘excess’ could be judged”. See *West Construction Co. v. Commissioner*, 7 T. C. 974, 978. See also Report of a Subcommittee of the Committee on Ways and Means, House of Representatives, 67th Cong., 3d Sess., on Proposed Excess Profits Taxation (dated August 8, 1940), pp. 3, 5. Quite obviously, the Regulations thereunder establish rules for the reduction of the invested capital, upon which the credit is based, as soon, and as definitely as possible, in keeping with the legislative policy of allowing a credit from the excess profits tax based upon the amount of capital actually “being risked” in the business. See Report of subcommittee, *supra*, p. 3.

Similarly, in deciding the question presented in this case, no controlling significance should be attached to the fact that at the time of the declaration of the dividend an entry was made debiting the surplus account. That entry did not actually reduce the earnings and profits, we submit: The effect of Section 115 (a) is to require a “distribution” *out of* “earnings and profits”. It is well settled that bookkeeping entries are not controlling for tax purposes. See *Helvering v. Midland Ins. Co.*, 300 U. S. 216; *Bazley v. Commissioner*, 331 U. S. 737; *Edwards v. Douglas*, 269 U. S. 204. That the making of the entry may have been justified from an accounting standpoint, likewise should neither be controlling nor significant here, we submit. The Supreme Court has expressly recognized that the computation of earnings and profits in the tax sense “does not necessarily follow

corporate accounting concepts". *Commissioner v. Wheeler*, 324 U. S. 542, 546. See also *Commissioner v. Estate of Bedford*, *supra*. The fact that a credit in a corresponding amount was made to a "Dividends Payable" account really adds nothing to support the view that earnings and profits were reduced at the time of the declaration. The entry to that account still left the dividend unpaid, and has no more effect than if the amount had been entered in some so-called "suspense" account. Rather, as pointed out in the dissenting opinion (R. 43-44), the entry to "Dividends Payable" account and the fact that the amount of the dividend was carried as a "liability" until the year when it was actually paid, really tend to "nullify any possible effect from a debit to surplus".

The question here involved, whether the earnings and profits are reduced at the time of the declaration or at the time of payment of a dividend, for the purpose of determining the amount of earnings and profits thereafter available for future distributions, was considered and passed upon directly by the Board of Tax Appeals in *Proctor v. Commissioner*, *supra*, where it was decided that the date of payment controls. The majority of the Tax Court in this case, however, declined to follow the *Proctor* case, perhaps because it misunderstood it, since it seemed to regard the *Proctor* case as one of "those cases" which did not involve "the effect of the declaration or payment [of a dividend] on the corporation's own financial structure". (R. 32.) The *Proctor* case, we submit, although ultimately involving an issue as to the portion of a dividend taxable to the recipient, as does the

instant case in final analysis, involved the exact question presented in this case as to whether earnings and profits are reduced by the declaration or by the payment of a dividend. Insofar as we have been able to ascertain, the *Proctor* case is the only one which has passed directly upon the question, with the possible exception of one other Board case in which, upon the authority of the *Proctor* case, the Board held that the date of payment, and not the date of declaration, controls in computing earnings available for distribution. *James v. Commissioner*, 13 B. T. A. 764, 771, affirmed without discussion of this point, 49 F. 2d 707 (C. C. A. 1st).

Before closing the discussion of this point, it might be well to refer briefly to the question of whether this Court has the power to review and reverse the decision of the Tax Court on this point. We submit that it has such power, clearly and unmistakably, and that the Court should exercise it and should reverse the decision of the Tax Court. This case is different, we submit, from such cases as *Commissioner v. Rainier Brewing Co.*, 165 F. 2d 217, rehearing denied, 166 F. 2d 324; *Seattle Brewing Co. v. Commissioner*, 165 F. 2d 216, rehearing denied, 166 F. 2d 326; *Schweppe v. Commissioner*, 168 F. 2d 284, in which this Court, because of its interpretation of the so-called "*Dobson Rule*," declined to review decisions of the Tax Court. But this case, unlike those cases, we believe, presents a pure question of law as to the proper interpretation or meaning of the statute, in the light of undisputed facts, and a question of this type has been recognized to be reviewable even under

the *Dobson* rule. See *Strauss v. Commissioner*, 168 F. 2d 441 (C. C. A. 2d). The question presented in this case on this point is as to the proper interpretation of the statutory definition of a dividend. The question is not whether the facts meet the statutory requirements (as this Court said in the *Rainier* and *Seattle Brewing* cases, *supra*), but what the statute means—in other words, the question is not as to whether there are present those facts or elements which constitute a “distribution” by a corporation “out of” earnings and profits, but what facts or elements must be present to constitute such a “distribution” under the statute, and that is clearly a question of law which has been recognized to be reviewable even under the *Dobson* rule. See *Commissioner v. Revere Land Co.*, 169 F. 2d 469, 479–480 (C. C. A. 3d), certiorari denied, 335 U. S. 853. See also *Dobson v. Commissioner*, 320 U. S. 489; *Trust of Bingham v. Commissioner*, 325 U. S. 365; *Crane v. Commissioner*, 331 U. S. 1; *McWilliams v. Commissioner*, 331 U. S. 694; *Commissioner v. National Carbide Corp.*, 167 F. 2d 304 (C. C. A. 1st), certiorari granted, 335 U. S. 810. See also *Ross v. Commissioner*, 169 F. 2d 483, 489 (C. C. A. 1st), in which the court recognized that even under the *Dobson* rule, where the decision of the Tax Court is based upon a “misconception” of the applicable legal principles, the appellate court could review. See also *Commissioner v. Batten, Barton, Durstine & Osborn* (C. C. A. 2d), decided December 23, 1948.

In *Schweppe v. Commissioner*, *supra*, the issue as to whether the distribution was of earnings and profits

and therefore taxable as a dividend turned upon a question as to whether or not a certain sum had been received by the corporation as a gift—obviously a more factual question (or at least one of mixed fact and law, as this Court thought), than involved in the instant case. Likewise, the present case is different from such cases as *Bazley v. Commissioner*, 331 U. S. 737 (referred to by this Court in the *Schweppe* case), where the question was as to whether a “paper reorganization” was in reality a disguise for the distribution of a taxable dividend, which question the Supreme Court felt was to be left to the judgment of the Tax Court, citing the *Dobson* case.

The *Dobson* rule has now in effect been repealed by Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., which gives the appellate courts power to review Tax Court decisions to the same extent as decisions of the District Courts in non-jury cases, with the result, we submit, of removing any possible doubt as to the reviewability of cases of this character. See *Commissioner v. Batten, Barton, Durstine & Osborn*, *supra*. See also *Hartz v. Commissioner* (C. A. 8th), decided October 27, 1948 (1948 P-H, par. 72,620), and *Kohl v. Commissioner* (C. A. 8th), decided November 12, 1948 (1948 P-H, par. 72,633).

Finally, before concluding the argument on this point, reference is made to the purported “findings” which the Tax Court included in the last paragraph (R. 28) of that part of the majority opinion, headed “FINDINGS OF FACT”. Those purported “findings” (to the effect that distribution of the dividend

declared in 1930 was made in the fiscal year 1931, and that earnings and profits were reduced in that year, and that only \$104,610.56 of the 1942 dividend was a distribution of earnings and profits) are not really findings, but conclusions of law, clearly reviewable, we submit. However, even if the purported findings were regarded as conclusions or findings of ultimate fact, they are likewise reviewable under broader scope of appellate review resulting from the effect of Rule 52 (a) of the Rules of Civil Procedure, which now governs. See *Aetna Life Ins. Co. v. Kepler*, 116 F. 2d 1, 4-5 (C. C. A. 8th). As has been recognized, if the ultimate finding is "contrary to the evidentiary findings or is based upon a misapplication of the law to the evidentiary findings", it is not binding upon the appellate court. *United States v. Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8th). In the review of non-jury District Court cases, of course, the appellate court does not review the evidence or settle conflicts therein, or determine questions of credibility, but when the issue turns not upon credibility or conflict in the evidence, but upon the legal significance to be given to the facts, then the appellate court may substitute its view for that of the trial court and may reverse the findings and conclusion of the trial court. See *Campana Corp. v. Harrison*, 114 F. 2d 400, 405-406 (C. C. A. 7th); *United States v. Anderson*, 108 F. 2d 475, 478-479 (C. C. A. 7th). See also *Kuhn v. Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. C. A. 3d). Even if the purported findings be regarded as mixed findings of fact and law, they would be reviewable. See *United States*

v. *Moroloy Bearing Service*, 124 F. 2d 373, where this Court reviewed and reversed certain findings, stating (p. 374) "The evidence is not substantially conflicting, and the findings in this respect involve mixed questions of law and fact."

It is submitted that, whether viewed as conclusions of law, or as conclusions or findings of mixed fact and law, or as conclusions or findings of ultimate fact, the purported "findings" above referred to are clearly reviewable by this Court. There was no question as to credibility, nor was there any conflict in the evidence in the case. In other words, there was no dispute as to the facts or as to what had transpired—the only controversy was as to the legal effect thereof. Since the conclusion drawn by the majority of the Tax Court as to the legal effect of the facts is unquestionably erroneous, this Court should reverse the holding of the majority on this question.

II

The Tax Court erred in holding, in the alternative, that in any event the earnings and profits were reduced in the fiscal year 1931 because the shareholders during that year constructively received the dividend declared in 1930

It is submitted that the holding of the majority of the Tax Court on this alternative question was also erroneous, and that the correct legal conclusion on the undisputed facts is that stated in the dissenting opinion (R. 37–39), namely, that there was no constructive receipt of the dividend by the shareholders in 1930, and that the dividend was actually not paid until 1933, when the amount thereof was credited against the indebtedness of the shareholders to Studios.

The fact that the corporate resolution made the dividend payable on December 15, 1930, is not, of course, controlling in determining the time when distribution took place. The wordings of corporate resolutions are not controlling for tax purposes. See *Tate v. Commissioner*, 97 F. 2d 658 (C. C. A. 8th), certiorari denied, 305 U. S. 639; *Phelps v. Commissioner*, 54 F. 2d 289 (C. C. A. 7th), certiorari denied, 285 U. S. 558; *United States v. Phellis*, 257 U. S. 156. See also *Sanborn v. Commissioner*, 88 F. 2d 134 (C. C. A. 8th), certiorari denied, 301 U. S. 700. The parties may well have intended that the dividend be paid in December, 1930, but, for some reason not shown by the record,²⁷ the dividend was not actually paid until

²⁷ As admitted during the testimony of the taxpayer's witness, the general manager of Studios, there is nothing in the corporate minutes indicating why the dividend was not paid in 1930. (R. 116-117.) The witness had earlier suggested an explanation as to why the credits to the individual accounts of the shareholders were not made until 1933: He stated (R. 93-94, 106) that the accounts of the shareholders in 1930 were broken down by "pictures" (i. e., the indebtedness of a shareholder was recorded in a separate account for each picture he was making) and he suggested that it would "not have been feasible" to make the credits then. Clearly, the explanation appears to be lacking in substance because, obviously, if it had really been desired that the dividend be paid in 1930, it certainly could have been done: All that it might have entailed was the making of some additional entries—according to the number of accounts, broken down by pictures, standing in the name of each shareholder. While the total number of existing accounts was not testified to directly by the witness, the four tabulations prepared by him, Respondent's Exhibits E, F, G and H (R. 193-196), heretofore referred to, do indicate that the accounts broken down by pictures were not so many in number. Only eleven of them are disclosed as existing on January 7, 1931 (which is near the "payable" date of the dividend, December 15, 1930), all eleven of them appearing in

1933. The treatment, for tax purposes, of the dividend should be determined by what was actually done and not by what was intended to be done, or what was originally planned. See *Jones v. Dawson*, 148 F. 2d 87, 90 (C. C. A. 10th). See also *Curtis v. Commissioner*, 89 F. 2d 736, 738 (C. C. A. 8th), and *Davidson v. Commissioner*, 305 U. S. 44, affirming 94 F. 2d 300 (C. C. A. 8th).

In dealing with the time when items are includible in income, the Treasury Regulations, in giving examples of "constructive receipt," have long provided that dividends are subject to tax "when unqualifiedly made subject to the demand of the shareholder." See Section 29.42-3 of Treasury Regulations 111, promulgated under the Internal Revenue Code, and Article 333 of Treasury Regulations 74, promulgated under the Revenue Act of 1928. In keeping with this provision, it has been repeatedly held that, as pointed out in the majority opinion of the Tax Court (R. 35), a dividend credited to a shareholder and unqualifiedly subject to his command, is taxable to him in the year of crediting, whether or not actually withdrawn. See *Hadley v. Commissioner*, 36 F. 2d 2 (App. D. C.); *A. D. Saenger, Inc. v. Commissioner*, 84 F. 2d 23 (C. C. A. 5th), certiorari denied, 299 U. S. 577; *Baker v. United States*, 17 F. Supp. 976 (C. Cls.); cf. *Avery v. Commissioner*, 292 U. S. 210. Similarly, as also

the tabulations respectively showing the indebtedness of Samuel Goldwyn, Inc. (R. 195) and Feature Productions (R. 196)—in each case the "N. P." item is not counted as a "picture" account, as undoubtedly it must be a designation of a "notes payable" account.

pointed out in the majority opinion (R. 35-36), payments by credit have been held sufficient for "dividends paid credit" purposes, if the dividend has been placed under complete control of the shareholder and removed from the control of the corporation. See *R. H. Bouligny, Inc. v. Commissioner*, 45 B. T. A. 456; *Valley Lumber Co. v. Commissioner*, 43 B. T. A. 423; *Atlantic Land Co. v. Commissioner*, 43 B. T. A. 474; and *Valley Tractor & Equipment Co. v. Commissioner*, 42 B. T. A. 311.

We neither deny nor disagree with the rule of "constructive receipt" of dividends referred to by the Tax Court majority, but we do maintain that under the facts of this case a holding that there was constructive receipt under that rule is clearly erroneous, as a matter of law. As recognized in the *Hadley* case, *supra* (p. 544) "the mere declaration of a dividend does not constitute either a dividend or a distribution"; in addition to the declaration, "funds [must be] set aside for its payment" and there must be, if not actual payment, such crediting to the account of the shareholder as to bring the funds under "the absolute and unqualified dominion and control" of the shareholder. These important elements are absent in this case, and the correct legal conclusion, upon the facts of this case, therefore, is that there was no constructive receipt. See *Korfund Co. v. Commissioner*, 1 T. C. 1180.

In passing upon the question of "constructive receipt" of dividends, this Court has definitely recognized that a "segregation" must be made in order

that a dividend may be regarded as constructively received.²⁸ See *Commissioner v. Scatena*, 85 F. 2d 729, 731. And in *Lawrence v. Commissioner*, 143 F. 2d 456, 457, this Court, while recognizing that a dividend credited on the books may be taxable, pointed out that it is “essential that the shareholder have an absolute right of withdrawal”. In the more recent case of *Frederick Smith Enter. Co. v. Commissioner*, 167 F. 2d 357 (C. C. A. 9th), where a dividend was declared within time to entitle the taxpayer to a credit but was not paid until thereafter, it was held that the date the dividend was actually paid controlled, in spite of arguments to the effect that the stockholders were indebted to the corporation in excess of the dividend, so that the two obligations were set off against each other as a matter of law, and that there was an agreement between the corporation and the stockholders to offset their dividends against their accounts.

It is submitted that under the facts of this case there was no control, as a matter of law. The dissenting opinion (R. 38) states that it is “obvious that the corporation had not lost, nor the stockholder acquired, control over the dividend”. As correctly observed in the dissenting opinion (R. 38), the mere crediting of the amount of the dividend to a “dividends payable” ledger account, in which the amount

²⁸ There was clearly no showing of any segregation by Studios in this case. No segregation or allocation of assets is revealed by the balance sheets accompanying its returns for the fiscal years ended 1931, 1932 and 1933, respectively. (R. 171-172, 179-180, 187-188.)

due each shareholder was shown, did not transfer control to the shareholders, no more than the usual entries to "bills payable" or "notes payable" accounts on corporate books transfer control over those accounts to the payee. As also properly observed in the dissenting opinion (R. 38), to have constructive receipt a showing is required that a shareholder could "get his money at any time". There is no testimony or other proof to that effect in the record in this case, and no such finding was made either in the findings of fact or in the majority opinion—and the dissenting opinion states (R. 39) that "such a showing is wholly absent here".

The majority opinion seems to suggest that control is inferable from the June 27, 1933, letters by the stockholders to the corporation directing the disposition of the dividend, and the opinion states that on the date of the letters the stockholders "had over the dividends an unqualified control which the corporation recognized". (R. 34-35.) We submit that the record establishes conclusively that such an inference is neither proper nor permissible in this case. The letters (R. 158, 159, 160, 161) purporting to convey to Studios instructions as to the disposition of the dividend were written on June 27, 1933—at least they bear that date, and in the majority opinion it is found that the instructions to Studios were given on that date (R. 26.) On the other hand, the record discloses that a month prior thereto, namely, on May 27, 1933, a journal entry was made (R. 154) providing for the debiting of the amount of the dividend to the "Divi-

dends Payable” account and the crediting of the amount thereof to the accounts of the shareholders; on the same date, May 27, 1933, a journal entry (R. 153) was made to reflect the assignment of \$28,000 of the dividend by Mary Pickford and Douglas Fairbanks to Feature Productions; and also on the same date, May 27, 1933, entries to reflect these matters were made in the “Dividends Payable” account (R. 156). Moreover, the record discloses that on the same date, May 27, 1933, Studios sent notices to the shareholders to the effect that their respective accounts had been credited with the amount of the dividend. (R. 155.) The taxpayer’s witness testified that the two 1933 journal entries (R. 153, 154) were made by him; that the two credit memoranda (R. 155) were prepared under his instructions; and that the entries in the “Dividends Payable” account were prepared under his supervision (R. 94–95). He further stated that the entries were made on the instructions of the then general manager of Studios (the witness at that time was auditor of Studios), whose instructions in turn “were predicated on written instructions received from the shareholders” (R. 95)—and those purported written instructions were identified as the letters of June 27, 1933 (R. 95–99), namely, letters coming one month after the dividend had already been credited to the shareholders. In the light of this record, we submit, it would be absolutely improper to infer any “control” in this case from those letters.

It is submitted that there are absent in this case the elements necessary, as a matter of law, to regard the dividend as constructively paid at any time before

its actual payment by the credits to the individual accounts of the shareholders. Aside from the entries debiting surplus and crediting the "Dividends Payable" account, which are of no significance, all that there really was before that time was the declaration of the dividend and that cannot amount to a "distribution" under the statute. As stated by the Supreme Court in *Avery v. Commissioner*, 292 U. S. 210, 215: "The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand 'cash or other property'; * * *."

Finally, we submit that this alternative question in the case presents, just as the first or main question, a question of law reviewable by this Court, for the same reason which we advanced to show the reviewability on the first question and, since the holding or conclusion of the majority of the Tax Court on this alternative question is also erroneous, it should be reversed.

CONCLUSION

It is submitted that the decision of the Tax Court is erroneous and should be reversed, with directions to reinstate the deficiency determined by the Commissioner.

Respectfully submitted.

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